DAVID ROBERTSON

IBLA 88-482 Decided February 2, 1989

Appeal from a decision of the California State Office, Bureau of Land Management, declaring seven millsite claims abandoned and void. CA MC 60109, CA MC 60110-CA MC 60115.

Set aside and remanded.

1. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claims--Millsites: Generally--Mining Claims: Millsites--Notice: Generally--Notice: Constructive Notice

   The Department has long followed the rule that trans- mission of a document to a party's last address of record by registered or certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. However, a party may defeat application of the rule by showing error in Postal Service procedure amounting to negligence in transmitting the decision.

APPEARANCES: David Robertson, pro se.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

David Robertson has appealed from a decision by the California State Office, Bureau of Land Management (BLM), dated May 2, 1988, declaring the America Mill Site (CA MC 60109) and the America Mill Site Nos. 1 through 6 (CA MC 60110 through CA MC 60115) abandoned and void for failure to file notice of intent to hold the claims for the years 1982 through 1987.

M.E. Rogers, on behalf of America Mine Operator 1/ recorded location notices for the seven millsite claims on October 18, 1979. By decision

1/ In a document entitled "Declaration under Penalty of Perjury," which David Robertson submitted in support of his appeal, he explains that America Mine Operator is a limited partnership, that M.E. Rogers was the "operator and promoter" until his death in 1981, and that since that time Robertson has been the "acting operator" of the limited partnership with responsibility for filing notice of intent to hold the claims involved in this appeal.

dated June 25, 1981, BLM declared the millsite claims abandoned and void for failure to file notice of intent to hold the claims for the period September 1, 1979, through September 1, 1980, as required by 43 CFR 3833.2-1. However, by decision dated April 2, 1982, BLM vacated its June 25, 1981, decision, quoting the following statement from Feldslite Corporation of America, 56 IBLA 78, 88 I.D. 643 (1981): "Filing a notice of intent to hold mill and tunnel sites is not a statutory requirement but is, in fact, considered only a regulatory requirement. Therefore, failure to file a notice of intent is a curable defect." 2/

By letter dated March 7, 1988, sent certified mail, return receipt requested, BLM informed America Mine Operator that its records indicated that notices of intent to hold the claims had not been received for the assessment years 1982 through 1987. Noting again that the failure to file a notice of intent to hold mill or tunnel sites is not a statutory requirement, and is considered a curable defect, BLM informed the claimant that it had 30 days from receipt of the March 7, 1988, letter to provide notice of its intent to hold the claims. Not receiving a response to this notice, BLM issued the decision herein appealed by Robertson.

By letter dated May 27, 1988, Robertson explained to the Board that he did not receive BLM's March 7, 1988, letter until May 26, 1988, for the following reasons:

> On February 29, 1988, I left California and I did not return until May 13, 1988. While I was away I had made arrangements for the post office to hold my mail; and I had agents who were autho- rized to pick up the mail and get it to me at reasonably frequent intervals. During the period that I was away [an individual] took about a bushel basket full of my mail. How he got it, I don't know; because he is not known to me. By coincidence the CHP [California Highway Patrol] picked him up on another charge and found the mail in his possession. Subsequently the mail was delivered to the postal authorities, and I was able to reclaim it yesterday [May 26, 1988].

In response to an inquiry from the Board, the Postal Inspector for the Temecula, California Post Office explained that the Riverside County Deputy Sheriff recovered Robertson's mail on April 13, 1988, from an individual to whom it had been mistakenly delivered by a window clerk at the Temecula, California Post Office. Further, the Postal Inspector stated that "[t]he U.S. Attorney's office in Los Angeles refused to prosecute [the individual] for theft of this mail because it was a postal service mistake which allowed him to be in possession of it." Additionally, the Postal Inspector stated that he did not conduct an inventory of the individual pieces of mail which were misdelivered, and therefore he could not inform the Board whether the recovered mail included the notices for the certified letter to America

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2/ Subsequent Board cases applying this rule include Red Top Mercury Mines, Inc., 96 IBLA 391, 395-96 (1987); Ptarmigan Co., 91 IBLA 113, 118 (1986); Otay Mining Co., 62 IBLA 166, 169 (1982).

Mine Operator. However, the Postal Inspector states that "[d]uring the course of our investigation, it was shown that a notice to pick up David Robertson's mail was misdeliverd to the wrong address."

[1] The rules governing constructive service are provided by both regulation and Board decisions. The applicable regulation, 43 CFR 1810(b), provides as follows:

> Where the authorized officer uses the mails to send a notice or other communication to any person entitled to such a communica-tion under the regulations of this chapter, that person will be deemed to have received the communication if it was delivered to his last address of record in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him. An offer of delivery which cannot be consummated at such last address of record because the addressee had moved therefrom without leaving a forwarding address or because delivery was refused or because no such address exists will meet the require- ments of this section where the attempt to deliver is substanti- ated by post office authorities.

Under the first sentence of 43 CFR 1810(b), "when BLM sends a notice or decision return receipt requested to a party's last address of record and it is delivered, it is deemed received by the addressee on the service date stated on the return receipt regardless of whether it was in fact received by the addressee." J-O'B Operating Co., 97 IBLA 89, 91 (1987). See also Lawrence E. Welsh, Jr., 91 IBLA 324 (1986); Richard L. Knowles, 88 IBLA 120 (1985). Under the second sentence of 43 CFR 1810(b), "when BLM sends a notice or decision, return receipt requested, to a party's last address of record and it is returned by the Postal Service because there is no forwarding address, or delivery was refused, or no such address exists * * * BLM is deemed to have met its obligation to notify the party and may act as if delivery had actually been made." J-O'B Operating Co., 97 IBLA at 92.

In J-O'B Operating Co., the Board stated that the general rule con- cerning constructive service is "sometimes described as implicit in the regulation and sometimes as a separate rule * * *." The Board refers to two avenues by which a party may defeat application of the general rule. The Board's analysis is set forth below:

> [T]he Department has long followed the general rule that transmission of a decision to a party's last address of record by registered or certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. Victor M. Onet, Jr., 81 IBLA 144, 146 n.2 (1984), and cases cited; Michele M. Dawursk, 71 IBLA 343 (1983); John Oakason, 13 IBLA 99, 102 (1973). In such a case the date of service is the date the item is received back by BLM. Michele M. Dawursk, supra at 347; Betty Alexander, 53 IBLA 139, 141 (1981); John Oakason, supra at 102.

> Application of the constructive service rule is based on two assumptions: First, that BLM's decision was sent to appellant's last address of record, and second, that the Postal Service prop- erly performed its duties. John H. Blackwood, 89 IBLA 379, 381 n.1 (1985). Due to the first assumption, upon return of an item as undeliverable, BLM is required to check its files to verify that the address to which the item was sent was correct and to determine whether a new address has been provided since the date the notice or decision was sent. Stephen C. Ritchie, 81 IBLA 162, 165 (1985); Estate of Glen R. Coy, 52 IBLA 182, 194, 88 I.D. 236, 242 (1981). If a change of address is found, notice must be sent to the new address to perfect service. Because of the second assumption a party may defeat application of the rule by showing error in Postal Service procedure amounting to negligence in transmitting the decision. Terry L. Wilson, 85 IBLA 206, 211, 92 I.D. 109, 112 (1985); Tom Hurd, 80 IBLA 107, 109 (1984); L. Lee Horschman, 74 IBLA 360 (1983); Brooks Griggs, 51 IBLA 232, 87 I.D. 612 (1980); Joan L. Harris, 37 IBLA 96 (1978).

97 IBLA at 92.

We conclude that Robertson has established error in Postal Service procedure amounting to negligence, and therefore that BLM failed to accom- plish constructive service in the instant case. BLM, having selected the Postal Service as its agent for the purpose of transmitting an official document, must bear the consequences of the failure of the Postal Service to make adequate attempts at delivery. Terry L. Wilson, 85 IBLA at 211, 92 I.D. at 112; Joan L. Harris, 37 IBLA at 98. Here the record demonstrates not only that the Postal Service delivered at least one notice to pick up Robertson's mail to the wrong house, but that Robertson's mail was, in fact, not delivered to the person designated by Robertson to pick up his mail. Under these circumstances the constructive notice provision of 43 CFR 1810.2(b) cannot be invoked.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded to BLM for action consistent herewith.

Gail M. Frazier
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge